HIGH COURT OF ORISSA: CUTTACK.

W.P.(C) No.5357 of 2009

In the matter of application under Article 226 and 227 of the Constitution of India.

Subodha Mishra ..... Petitioner

- Versus-

Director, National Institute of Science Education & Research (NISER), Bhubaneswar.
... Opposite Parties

Counsel for Petitioner : Petitioner in person; Mr. J. K. Rath, Sr. Counsel.

Counsel for Opp.Parties : M/s. Sarbeswar Barik, D. K. Mohanty, P.C. Behera; Mr. Anup Kumar Bose (A.S.G.), Mr. Aurovinda Mohanty (C.G.C.)

PRESENT:

THE HONOURABLE SHRI JUSTICE SUJIT NARAYAN PRASAD

Date of hearing and judgment: 20.03.2018

S. N. Prasad, J. This writ petition is under Article 226 and 227 of the Constitution of India for issuance of direction upon the opposite parties to select the petitioner as a faculty member (Associate Professor) of Department of Physics in National Institute of Science Education and Research, in short NISER.

2. The brief fact of the case of the petitioner as pleaded in the writ petition is that the opposite party – NISER has made an advertisement inviting applications for Indian Scientists with high profile research, agenda and flair for teaching for different positions, i.e., Assistant Professor, Reader (F),

Associate Professor and Professor. The qualification prescribed in the advertisement is Ph.D. in any area of Biology, Chemistry, Mathematics and Physics. The experience required was one / two years Post Doctorate research and / or teaching experience in desirable for Assistant Professor Grade. The petitioner who came across this advertisement, immediately applied for consideration of his candidature to be appointed as Associate Professor, since the petitioner is the holder of two Post Doctorate degree and also of Ph.D.; one from India and the other from America, along with adequate teaching experience in the University of Missouri, Columbia, U.S.A. as also having such experience in the field of Physics, has submitted his application for its consideration but he has not been selected, as such he being aggrieved, has approached this court for issuance of appropriate direction as prayed therein.

3. This court, at the first instance, has issued notice to the opposite parties, in terms thereof, counter affidavit has been filed by the then Director, NISER, Bhubaneswar *inter alia* stating therein that the Chairman of the Selection Committee of the faculties of Physics and the Selection Committee has been duly been approved by the Chairman, Atomic Energy Commission and Secretary, Department of Atomic Energy, Government of India, Mumbai, the Screening Committee which consists of the officers of the Institute to screen the application and to check whether the applicants meet the norms specified in the advertisement. The Selection Committee has also fixed the criteria for short listing the candidates for appointment of different position by the Screening Committee, for the post of Associate Professor, 8 years teaching/ research / industrial experience is required, out of which at least 3 years should be at the level of Assistant Professor.

The Selection Committee, on scrutiny of the application for the post of Associate Professor, has found that the petitioner does not meet the minimum requirement of 8 years of experience in teaching and research out of which minimum of 3 years at the level of Assistant Professor, hence did not short list his name.

It has also been found by the Screening Committee that the petitioner, after Ph.D from IOP, Bhubaneswar, did one year post doctoral fellowship in IIT, Kharagpur but after the post doctoral in India, he preferred to do another Ph.D. in Missouri-Columbia University which means that he could not get any post doctoral position in India or abroad, as such he decided to join for Ph.D. with a teaching associate-ship which clearly suggests that the petitioner was not very confident of his Ph.D. and post doctoral works done in India.

It has been stated that there is nothing illegality and there is no mala fide on the part of the opposite party – NISER, rather in pursuance to the recommendation of the Selection Committee constituted after the approval of the competent authority, the criteria has been fixed which is applicable to all the candidates and the Screening Committee has not found the candidature of the petitioner up to mark as per the basis of criteria fixed by the Selection Committee, accordingly he has not been short listed, hence there is nothing illegality, as such, this court may not interfere in exercise of extra ordinary jurisdiction conferred under Article 226 of the Constitution of India.

The learned counsel has submitted that after the advertisement in question, two advertisements have subsequently been issued and candidature of the candidates have been considered, the suitable candidates have been appointed as Associate Professor, as such, at this stage, the case of

the petitioner cannot be considered in the light of the earlier advertisement which has been superseded by two subsequent advertisements.

4. The petitioner, in response, has submitted that it is incorrect to say that 8 years experience, out of which 3 years as Assistant Professor was made as the criteria to shortlist since a candidate has been shortlisted to allow him to participate in the selection process even though he was not fulfilling this criteria, as such the opposite parties have adopted pick and chose policy to throw the candidature of the petitioner to deprive him to get a chance for consideration of his candidature.

He submits that the opposite party – NISER has not come forward with any statutory recruitment rules and what is the basis of lying down the criteria of having 8 years experience out of which 3 years as Assistant Professor has not explained by them to this court and it is settled that any recruitment is to be made on the basis of recruitment rule and it cannot be whimsically.

The petitioner has submitted that merely on account of the fact that two advertisements have been issued, the petitioner cannot be deprived to get a chance for consideration since there is an interim order passed by this court to the effect that any appointment made during pendency of the writ petition as Associate Professor, shall be subject to the result of the writ application.

5. It is evident from the record that this writ petition has been filed by the petitioner through an advocate but subsequently he has taken no objection from the learned counsel and thereafter appeared in person to contest his case.

6. This court has heard the petitioner in person as well as the Central Government Counsel who has appeared for opposite party – NISER at length. The pleadings as well as the documents brought on record have also been appreciated by this court.

Before going into the factual aspect of the case, it is relevant to point out the spirit to create the National Institute of Science Education and Research, in short NISER. NISER is recognized as Centre of Excellence in science education and research in four basic sciences, i.e. Biology, Chemistry, Mathematics and Physics and in related areas. The purpose is to provide exemplary teaching and research to inspire and motivate bright young students to dedicate their lives for scientific research. The following programs in science education for bright and meritorious students selected on all-India basis:-

(a) An integrated 5-year M.Sc. programme in the core and emerging branches of Basic Sciences to students after their 10+2 Higher Secondary schooling. This in turn will be integrated with Ph.D. programme on the one hand and employment in various R & D organizations and industry in the country on the other.

(b) Integrated M.Sc. + Ph.D. programme after B.Sc. from other Universities.

(c) Ph.D. programme after M.Sc. from other universities.

The academic programme is designed to provide strong foundations to the students, through core courses, before they embark at the threshold of research in the field of their choice. The underlying purpose has been casted upon the faculty members to devote 30 to 40 percent of his / her annual time for teaching and to devote the rest to research and guiding research scholars.

The Scientific Advisory Council of the Prime Minster endorsed in 2005 for setting up of 2 Indian Institutes of Sciences for Education & Research (IISERs) at Kolkata and Pune. Subsequently a third IISER has been announced to be set up at Chandigarh. In the year 2006 it has been announced to set up National Institute of Science Education and Research (NISER) at Bhubaneswar which would be similar in scope to the IISERs and would be funded by the Department of Atomic Energy to give excellent opportunity to the Department of Atomic Energy to expand its horizon and create a new environment for young minds in India who want to pursue research in basic sciences.

Thus, it is evident that the NISER has been created as a centre of excellence of under graduate and post graduate education with a faculty degree involved in scientific pursue who will lead the students by example.

The NISER, in order to achieve the mission for which it has been established, has come out with an advertisement in the year 2008 for fulfilling the post of different faculty members including Associate Professor providing the eligibility qualification to have Ph.D. in any area of Biology, Chemistry, Mathematics & Physics. Experience as desirable for the Assistant Professor Grade is one / two year's postdoctoral research and / or teaching experience. For higher grades it should be appropriate to the positions applied for.

The advertisement which has been annexed as Annexure-1 stipulates the condition that the qualification and experience prescribed are the minimum and mere position of the same does not entitle a candidate to be considered for the post, however, the experience criteria may be relaxed for exceptionally meritorious candidates. Applications have been directed to be received through e-mail which has been made as an open advertisement

having no time limit for sending the application, but the application received will be taken up for consideration at regular intervals.

The petitioner, who claims that he is having requisite educational qualification as also 8 years experience, has submitted his application form but he has not been shortlisted by the Screening Committee and thereby has not been allowed to participate in the selection process which is under challenge.

7. This court has found from the pleading made by the petitioner and the plea taken by the opposite parties in their counter affidavit that the petitioner although was possessing the minimum qualification of having Ph.D. in Physics but lacking experience of having 3 years teaching experience as Assistant Professor.

It is evident from the advertisement that the experience part has been left open to be decided by the authority since there is reflection under the heading 'Experience' "**for higher grade it should be appropriate to the positions applied for**."

The opposite parties have come out with a communication dtd.28.01.2009 and from its perusal it is evident that the selection committee was constituted for faculty position in the discipline of Physics which has been approved by the Director which consists of 7 members. The constitution of committee is on the basis of the conditions mentioned under 3.7.10 of Annexure-2 which is an extract of the decision taken by the opposite party – NISER whereby and where under the Director or the Chairperson of the Selection Committee has been delegated with the power to appoint the Screening Committee and in terms thereof the Screening Committee has been

constituted. It is evident from other documents as contained in page 45 of brief which is the criteria for short listing the candidates for appointment in different teaching positions which includes the faculty member Associate Professor wherein the qualification for all position has been provided to be Ph.D. with first class or equivalent and in addition for Associate Professor 8 years teaching/research/industrial experience of which at least 3 years should be at the level of Assistant Professor has been referred.

8. This court, at the earlier instance, has directed the learned counsel appearing for the NISER to come with the recruitment rules but the learned counsel representing them, on the strength of an affidavit filed by them, has submitted that the selection has been made on the basis of the Screening Committee which has been appointed by the order of the director having been approved by the competent authority and they have formulated a criteria, basis upon which the selection has been made.

The petitioner has strongly refuted that since the criteria for having 8 years experience out of which at least 3 years at the level of Assistant Professor since not in the advertisement, hence on that ground not short listing the candidature of the petitioner is improper.

9. This court, after appreciating the argument of learned counsel for the petitioner, is of the view that in the selection process, the jurisdiction of High Court sitting under Article 226 of the constitution of India is to interfere with the decision making process and not in the decision and if there is any illegality or any infirmity committed by the selection committee in the selection process, then certainly it is amenable to the writ jurisdiction, reference in this regard may be made to the judgments rendered by Hon'ble Apex Court in the cases of **Tata Cellular Vrs. Union of India**, reported in

(1994) 6 SCC 651 (para 74), **H. S. Sidhu Vrs. Devendra Bapna and Others**, reported in (2016) 1 SCC 495 and **U. V. Mahadkar Vrs. Subhash Anand Chavan and Others**, reported in (2016) 1 SCC 536.

In the light of this proposition, this court, while examining the factual aspect, has found that the selection committee has been constituted, the said committee has formulated a criteria for selection and in terms of the conditions of advertisement which stipulates for experience for the higher position which is equivalent to the faculty, has fixed the criteria of having 8 years teaching/research/industrial research out of which at least 3 years at the level of Assistant Professor, admittedly the petitioner is having with 8 years of teaching experience but not 3 years out of which at the level of Assistant Professor and accordingly he has not been shortlisted by the screening committee.

Although the basis upon which the candidature of the petitioner has not been shortlisted is not in the advertisement but it is the settled position of law that criteria for short listing or criteria for selection is not required to be reflected in the advertisement, rather it is to be decided by the selection committee if not provided under the recruitment rule, reference in this regard may be made to the judgments rendered by Hon'ble Apex Court in the cases of **J. Ranga Swamy Vrs. Government of Andhra Pradesh and Others**, reported in AIR 1990 SC 535, **P. U. Joshi and Others Vrs. Accountant General, Ahmedabad and Others**, reported in (2003) 2 SCC 632 and **Chandigarh Administration Vrs. Usha Kheterpal Vaie and Others**, reported in (2011) 9 SCC 645 (para-22).

It is the contention of opposite party – NISER that the Selection Committee consisting of the expert members is empowered to make selection

taking into consideration the nature of engagement in institutes like NISER and it cannot be fixed by way of a fixed criteria, i.e. fixed qualification and experience, rather the intent and spirit of the opposite party is to select the more capable and meritorious in order to develop the human resource by imparting qualitative teaching to them and that is the reason it has been left open to the selection committee to fix the criteria so that the best can be chosen amongst the applicants.

It is also evident that the advertisement has been made as open advertisement, the reason behind it is that the applications is to be accepted by the opposite parties without reflecting any closure date to receive the applications so that maximum candidates may make their applications and more suitable and meritorious candidate be selected amongst them, if it will be restricted by fixing a date for receipt of application, there might be chances to receive the applications lesser in number, meaning thereby, the whole objective to invite applications in large number is for selection of best amongst them.

It is in this pretext if the selection committee has fixed a criteria of having 8 years experience with 3 years at least as a teaching experience as Assistant Profess, it cannot be said to be arbitrary and improper, rather since it has been made applicable to all the candidates who have participated in pursuance to the said advertisement, as such it cannot be said that it is only in order to eliminate the petitioner this experience part has been inserted in the selection criteria.

This court, considering the limited jurisdiction to exercise the power conferred under Article 226 of the constitution of India by way of power of judicial review in the matter of selection, is of the view that there is no

infirmity in the selection process, as such declines to interfere with the decision taken by the NISER.

10. It is also worth to mention here that the advertisement which is subject matter in the instant writ petition is dtd.3.6.2008 and when the eligible candidates having not been selected, then the opposite party - NISER has gone for two subsequent advertisements and thereby the selection has been made; one through direct recruitment and second by way of promotion from the post of Assistant Professor.

Thus, it is evident that after the advertisement in question which is the subject matter of the writ petition, two subsequent advertisements have been issued and the selection has been made and on that count also, the petitioner has got no case after publication of two subsequent advertisements since the petitioner has not questioned the said two subsequent advertisements issued by the opposite party - NISER.

11. The petitioner at this stage has contended that this Court by way of an interim order passed on dtd.29.04.2009 has directed that any appointment made in the post of Associate Professor in NISER, Department of Physics shall be subject of the result of the writ petition, the said order is also of no aid to the petitioner because this court while passing interim order on 29.4.2009 has taken into consideration the advertisement dtd.3.6.2008 and thereafter if any advertisement has been issued, it was upon the petitioner to assail the said advertisement by filing appropriate application but he has chosen not to do so, and it is settled that if any interim order is passed with respect of the selection process, it is only related to the advertisement in question and not to the subsequent advertisements for the reason that the interim order is to be given during pendency of the writ petition involving an

issue and here in the instant case the subject matter of the writ petition is the advertisement dtd.3.6.2008, as such the force of the interim order dtd.29.4.2009 is only be applicable so far as the advertisement dtd.3.6.2008 is concerned.

It is the specific case of the opposite party - NISER that pursuant to the advertisement dtd.3.6.2008 since no candidate found to be eligible or up to mark, hence not selected, as such the interim order dtd.29.4.2009 will be said to be lost its force, moreover thereafter, the fresh advertisements have been issued and in pursuance thereof three appointments have been made which has also not been challenged by the petitioner, as such on this ground also the petitioner has got no case.

In view of the entirety of facts and circumstances according to the considered view of this court the petitioner has failed to make out a case in his favour.

Accordingly the writ petition fails and it is dismissed.

The interim orders, if any, stands vacated.

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S.N.Prasad, J.

Orissa High Court, Cuttack,
Dated the 20th March, 2018 / Manas.